

**The Next Frontier: Preventing and Litigating Family
Responsibilities Discrimination**

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I. Introduction

Family Responsibilities Discrimination (“FRD”), also known as caregiver discrimination, was first articulated as a discriminatory employment practice in the early 2000s.¹ By 2010, FRD cases had increased almost 400 percent, making it perhaps the fastest growing area of employment law.² FRD grew out of the numerous statutes in the 1960s and 1970s designed to end discrimination against individuals on the basis of race and gender—passage of which was largely driven by President John F. Kennedy’s Commission on the Status of Women (“PCSW”), established by executive order in 1961. This influential commission, headed by Eleanor Roosevelt until her death, was charged with reviewing progress and making recommendations for constructive action in a number of areas. These included differences in the legal treatment of men and women in regard to political and civil rights, property rights, and family relations, and the employment policies and practices of the government of the United States. The Commission also advocated for additional affirmative steps to be taken through legislative, executive, or administrative action to ensure nondiscrimination on the basis of sex and to enhance constructive employment opportunities for women.

The PCSW culminated with a report (*American Women, Report of the President’s Commission on the Status of Women*), published in 1963. The report recognized the “subtle limitations imposed by custom, upon occasion reinforced by specific barriers.” It found that some of the discriminatory provisions were contained in the common law, some were written into statute, some were upheld by court decisions, and others took the form of practices of industrial, labor, professional, or governmental organizations that discriminated against women in apprenticeship, training, hiring, wages, and promotion.³

While recognizing that women were negatively impacted by certain policies and practices, the Executive Order establishing the PCSW embodied the assumption that women would (and should) continue in their role as the primary caretakers of their families. It stated:

WHEREAS a Governmental Commission should be charged with the responsibility for developing recommendations for *overcoming discriminations* in government and private employment on the basis of sex and for developing recommendations for services which will enable women to *continue their role as wives and mothers* while making a maximum contribution to the world around them.

(Emphasis added.)⁴ The PCSW's strong commitment to eliminating discrimination against women in the workforce was undercut by widespread assumptions about motherhood that continue to the present day. Social scientists have now documented that motherhood triggers strong negative competence and commitment assumptions that lead to "maternal wall" bias, wherein employees who become pregnant, become mothers, or begin working on a flexible work arrangement are penalized at work.⁵ Indeed, the leading study on maternal wall bias found that mothers were 37% less likely to be recommended for hire, only half as likely to be promoted, and offered an average of \$11,000 less in salary than candidates with identical resumes but no children.⁶ In addition, even mothers who are indisputably committed and competent are often penalized at work because they are seen as less likable than their peers—and perhaps as not-so-good mothers.⁷

The maternal wall for mothers is matched by the flexibility stigma for fathers. Fathers who request parental leave or a flexible schedule trigger sharp workplace penalties that stem from gender discrimination: studies show these men are penalized because they are seen as too feminine.⁸ Indeed, even men who request no accommodations whatsoever encounter high levels of "masculinity harassment" if they

make their caregiving responsibilities salient on the job.⁹ This social science has paved the way for legal theories that challenge caregiver discrimination as gender discrimination.

II. The Face of Family Responsibilities Discrimination in the Workplace

FRD in the workplace occurs when an employer takes an adverse action (such as termination, denial of a promotion, or refusal to hire) against an employee because of the employee's caregiving responsibilities. FRD may include pregnancy discrimination, discrimination against mothers and fathers, and discrimination against workers with other family caregiving responsibilities. While FRD most commonly affects pregnant women and mothers of young children, it can also affect fathers who wish to take on more than a nominal role in family caregiving and employees who care for aging parents, or ill or disabled partners.

FRD law has developed rapidly in the past two decades. While FRD lawsuits were once brought primarily by mothers under the legal theory of "sex-plus" discrimination,¹⁰ today FRD is seen as gender discrimination, pure and simple. Plaintiffs have successfully alleged FRD using more than a dozen causes of action under numerous federal statutes.¹¹

By 2007, FRD had become such a significant issue that the EEOC issued enforcement guidance intended to define FRD, summarize the state of FRD law, and offer employers guidance on how to prevent discrimination against caregivers.¹² The EEOC Guidance noted that no federal law prohibits discrimination against caregivers *per se*, but that "there are circumstances in which discrimination against caregivers might

constitute unlawful disparate treatment” under Title VII, specifically when such discrimination embodies a stereotype on the basis of sex or gender.¹³ The Guidance also points out that “In addition to sex discrimination, race or national origin discrimination may be a further employment barrier faced by women of color who are caregivers.” To describe the type of stereotyping that might give rise to a claim for FRD, the EEOC quoted Chief Justice Rehnquist in the following passage from its guidance:

“[T]he faultline between work and family [is] precisely where sex-based overgeneralization has been and remains strongest.” Sex-based stereotyping about caregiving responsibilities is not limited to childcare and includes other forms of caregiving, such as care of a sick parent or spouse. Thus, women with caregiving responsibilities may be perceived as more committed to caregiving than to their jobs and as less competent than other workers, regardless of how their caregiving responsibilities actually impact their work. Male caregivers may face the mirror image stereotype: that men are poorly suited to caregiving. As a result, men may be denied parental leave or other benefits routinely afforded their female counterparts. Racial and ethnic stereotypes may further limit employment opportunities for people of color.¹⁴

The EEOC makes clear that “[e]mployment decisions based on [stereotypes of caregivers] violate federal antidiscrimination statutes Thus, for example, employment decisions based on stereotypes about working mothers are unlawful because ‘the antidiscrimination laws entitle individuals to be evaluated as individuals rather than as members of groups having certain average characteristics.’”¹⁵

FRD cases often involve similar fact patterns, including the following;

- A woman’s position is “eliminated” while she is on maternity leave, yet someone else is hired to do the work she had been doing;
- A father who takes time off to be with his children receives an impossibly heavy workload from his supervisor and is thereafter penalized for not being able to carry this burden;
- A mother isn’t considered for promotion because her supervisor thinks she won’t want to work any additional hours now that she has young children;
- A man is fired when he asks for leave to care for his elderly parents.

When an employee faces any of the above adverse actions, s/he has a claim for FRD.

The following section describes some of the legal frameworks under which an employee may bring an FRD claim.¹⁶

III. Federal Laws Most Commonly Used to Litigate FRD Claims

No federal statute expressly prohibits discrimination against caregivers.

Causes of action for FRD arise from numerous federal and state statutes, municipal ordinances, and from common law. This paper focuses on federal law, but practitioners representing caregivers should thoroughly research any applicable state or municipal law, as well as common law theories of action.

A. Title VII

Title VII, passed one year after the Commission's report was published, prohibits discrimination in employment on the basis of gender (including pregnancy), race, color, religion, and/or national origin. Although, as discussed above, Title VII does not prohibit discrimination against caregivers *per se*, there are circumstances in which discrimination against caregivers might constitute unlawful discrimination on the basis of gender/sex or pregnancy.¹⁷

Title VII claims for discrimination based on any protected classification are generally litigated under two theories of discrimination: "disparate treatment," in which the employer *intends* to discriminate against an employee within a "protected classification" such as gender; and disparate impact, a form of unintentional discrimination where an employer has a policy that is neutral on its face, but which has a disproportionately negative effect on a protected class (such as women or men).¹⁸

1. Disparate Treatment Claims

In order to bring a claim for FRD under a theory of disparate treatment, a plaintiff must first make out a “prima facie case.”¹⁹ A prima facie case is made up of four elements. First, a plaintiff must show that s/he is part of a protected class; she is qualified for the position; she has suffered an “adverse employment action,” such as termination or refusal to hire; and finally, she must provide evidence giving rise to an inference of unlawful discrimination.²⁰ Once the plaintiff has established her prima facie case, the burden shifts to the employer to proffer a “legitimate, non-discriminatory reason” for its adverse action against the plaintiff (such as a need to reduce the workforce or a plaintiff’s performance problems). At this point, a plaintiff must show that the employer’s proffered legitimate justification is pretextual or false in order to prevail on a claim for discrimination.

a. Proving membership in a protected class with evidence of sex-based stereotyping

Proving a claim for FRD under a disparate treatment theory presents one particular hurdle of which litigators should be aware: because “caregiver” status is not itself a protected class, a plaintiff must generally link her caregiver status to gender or sex.²¹ In other words, a plaintiff must show that her employer discriminated against her because of a stereotype regarding caregivers that is linked in some way to gender or sex. Adverse employment actions motivated by a sex-based stereotype can be sex discrimination under Title VII.

The theory of sex-based stereotypes was first developed in *Price Waterhouse v. Hopkins*, in which the U.S. Supreme Court found an employer's negative treatment of a female employee to be a violation of Title VII because the employer's reason for taking the adverse action was that the employee was not feminine enough: she did not wear makeup or jewelry, or have her hair styled.²²

Stereotyping in the context of FRD is most classically the assumption that mothers are no longer committed to their careers once they have children. In several federal cases, plaintiffs have alleged stark stereotyping evidence of discrimination on the basis of family responsibilities by their supervisors. In *Moore v. Alabama State University*, for example, the plaintiff alleged that her supervisor had told her that he could not promote her because she was pregnant, and later told her that she could not be considered for the promotion because she was a married mother.²³ In *Lust v. Sealy, Inc.*, a supervisor admitted that he didn't consider recommending a female subordinate for a position that required relocation because she had children and he didn't think she'd want to relocate her family.²⁴ The plaintiff, of course, had never told him any such thing; the court found that "On the contrary, she had told him again and again how much she wanted to be promoted, even though there was no indication that a Key Account Manager's position would open up any time soon in Madison."²⁵

b. Proving FRD discrimination without relying on "comparator" evidence

Another hurdle faced by plaintiffs in FRD claims (and all other Title VII claims) is the requirement imposed by some courts that the plaintiffs proffer a comparator. In an FRD claim, a comparator might be another worker without children, less qualified for promotion than the caregiving plaintiff, who nonetheless receives the promotion.

Comparator evidence is, however, not necessary to prove an FRD claim. Even the *McDonnell-Douglas* court recognized that the elements of the test were not meant to be rigid or inflexible.²⁶ Nonetheless, courts sometimes apply the test in an inflexible manner, insisting that a plaintiff show, at the prima facie stage or at the pretext stage, that a similarly situated worker outside the plaintiff's protected class (a comparator) was treated more favorably or differently than the plaintiff.²⁷

It is important to recognize (and to ensure that the trier of fact understands) that comparator evidence is only one way of proving a disparate treatment case. Title VII requires plaintiffs to prove that an adverse employment action is "because of . . . sex." Nothing in the language of Title VII requires limiting probative evidence of discrimination to comparator evidence. Appropriately, many courts allow plaintiffs to survive summary judgment even if they have not identified comparators.²⁸ A variety of methods permit proof of disparate treatment without comparators, including evidence that the adverse action was based on sex stereotyping (as discussed above) or occurred under circumstances giving rise to an inference of discrimination such as temporal proximity²⁹ or remarks indicating discriminatory animus (intention).³⁰

2. *Disparate Impact Claims*

As discussed above, disparate impact is another theory of discrimination under Title VII, separate from disparate treatment. In a disparate treatment claim, an employer has a policy in place that appears neutral on its face – that is, it does not explicitly discriminate against a protected class. However, if that policy has a disproportionately negative impact on women (or any other "protected class," *e.g.*, a racial or religious group), it may be unlawful under Title VII. An example of a neutral policy that has a

disproportionately negative impact on women or caregivers would be a strict attendance policy that does not allow employees to take time off to care for ill family members.³¹ Obviously, caregivers would suffer far more from such a policy than a non-caregiver. The employer could therefore be liable under Title VII. Importantly, a disparate impact claim does not require the employee to show that the employer harbored discriminatory intent.

Disparate impact claims often have proven to be an uphill battle for plaintiffs, however. Plaintiffs typically seek to prove disparate treatment cases with statistical evidence, showing that the employer's neutral policy disproportionately affected the protected class at issue (for our purposes, caregivers). Courts have placed stringent requirements on statistical evidence; however, many of them are erroneous adoptions of statistical principles.³² In addition, in failure to hire cases, courts have required that the relevant statistical pool be comprised only of individuals interested in the job at issue and qualified for that job.³³

B. Family and Medical Leave Act Claims (FMLA)

The Family and Medical Leave Act (FMLA)³⁴ provides up to 12 weeks per year of job-protected, unpaid leave for employees who: 1) have a serious health condition; 2) need to care for a family member (spouse, child, or parent) with a serious health condition or have a new child in their family; and/or 3) need to tend to a qualifying exigency arising out of a family member's (spouse, son, daughter, or parent) active-duty military status. FMLA leave may be taken all at once or intermittently.

FMLA provides qualifying employees with three types of protection. First, an employer may not interfere with, restrain or deny exercise of rights afforded by FMLA.

Second, an employer may not discipline or discharge an employee for taking FMLA leave. And third, an employer may not discharge or discriminate against an employee for opposing unlawful practices under the FMLA.

1. FRD Cases under the FMLA

Two types of FRD cases are commonly brought under the FMLA. The first type is when an employer takes an action that interferes with the employee's leave. Such interference may be refusing to grant an employee leave or discouraging the employee from taking the leave. The second type of claim occurs when an employer discriminates or retaliates against an employee for taking the leave.

2. Limitations of FMLA Claims

The FMLA has a few significant limitations. First, the statute only applies to (1) public agencies and (2) private-sector employers who have fifty or more employees in 20 or more workweeks in the current or preceding calendar year within seventy-five miles of the worksite in question—thus exempting employers who have hundreds of employees but less than fifty in any one geographic location. The impact of this is to exempt 60% of U.S. employers from FMLA obligations.

Another limitation on FMLA coverage is that, when used to cover time away from work to care for an ill family member, the relevant illness must fit the statutory definition of “serious health condition.” This is defined as: “an illness, injury, impairment, or physical or mental condition that involves [either] inpatient-care . . . or continuing treatment by a health care provider.” The FMLA was never intended to cover a short-term, moderate illness but rather is limited to extended absences necessitated by serious illnesses.

3. *The Americans with Disabilities Act May Offer Additional Leave*

The ADA, discussed in detail below, prohibits an employer from discriminating against an individual with a disability and also requires the employer to provide a disabled individual with a reasonable accommodation if doing so would allow the employee to perform his or her job. This provision sometimes allows workers to extend their family leaves beyond the twelve-week period provided for under the FMLA. Under the ADA's regulations, it is a reasonable accommodation to grant an employee a leave of absence (intermittent or otherwise) in order to deal with a disability, so long as that leave is not indefinite. Thus, if a pregnant woman has exhausted her FMLA leave but requires more time to recover from a pregnancy-related condition, she should ask her employer for an accommodation under the ADA (or similar state law).³⁵

C. The Americans with Disabilities Act (“ADA”)

The ADA³⁶ protects workers from discrimination based on family responsibilities in two distinct ways. First, it prohibits discrimination based on a worker's association with an individual with a disability. In addition, pregnant women are often entitled to workplace accommodations under the ADA.

FRD claims under the “ADA association clause” may arise when a caregiver takes time off from work to care for a family member with a disability. The EEOC has issued regulations explaining the interaction of the ADA with FRD:

[A] qualified applicant without a disability applies for a job and discloses that his or her spouse has a disability. The employer thereupon declines to hire the applicant because the employer believes that the applicant would have to miss work or frequently leave work early in order to care for the spouse. Such a refusal to hire would be prohibited by [the ADA].³⁷

It is important to note, however, that although the ADA requires an employer to make reasonable accommodations for employees with disabilities (such as modifications to an employee's workstation), it does not require an employer to provide accommodations for caregivers.

Blue-collar and low-wage women often lose their jobs when their employers deny them accommodations required as a result of their pregnancies, including accommodations as simple as the right to carry a water bottle or to have a work station closer to the restroom (due to severe nausea).³⁸ Today, pregnant women often are entitled to accommodation under the ADA as a result of the 2008 ADA amendments, the Americans with Disabilities Amendments Act (ADAAA).³⁹ Following those amendments, many pregnancy-related conditions now qualify as "disabilities," thereby entitling pregnant women to accommodations for medical conditions caused by pregnancy. Thus, a pregnant woman suffering from gestational diabetes is entitled to a reasonable accommodation from her employer in order to cope with the symptoms of that condition. So, too, is a woman suffering from carpal tunnel syndrome, which occurs far more frequently in pregnant women than in any other population.⁴⁰

D. The Employee Retirement Income Security Act (ERISA)

The Employee Retirement Income Security Act (ERISA)⁴¹ has been used by caregivers to challenge an employer's decision to terminate based on the employer's fear of high health insurance costs where parents have disabled children or where mothers have expensive, high-risk, pregnancies.⁴² ERISA has also been used to obtain relief when an employer terminates a pregnant employee in order to prevent the employee from taking a maternity leave.⁴³

IV. How Common Are FRD Cases and How Successful Are They?

FRD cases are increasingly common. The Center for WorkLife Law (WLL) at UC Hastings College of the Law documented a 400% increase in FRD claims in the last decade as compared to the prior decade. In comparison, there was only a 23% increase in all other discrimination claims during the same time period. Moreover, plaintiffs win FRD cases at a higher rate than other employment-related cases. FRD cases identified by WLL show a greater than 50% success rate for the plaintiff, which presents serious risk management concerns for employers, given that FRD plaintiffs have received substantial awards and settlements. One plaintiff was awarded \$11.65 million, another received \$1.8 million, a third was awarded \$1.6 million, and a fourth obtained \$940,001.⁴⁴

Employers, then, should be aware that FRD claims are a potentially serious source of liability. To avoid liability for FRD, employers should train personnel so that they do not inadvertently violate the law and create liability for their company clients.

VI. Conclusion and Recommendations

When the final report of the PCSW was published in 1963, it sought to create a workplace where women and men participated as equals. This goal has yet to be achieved, but thanks to legislation such as Title VII, the workplace has become much more hospitable for women. The report assumed that women would participate in the workforce while continuing to shoulder most or all family responsibilities. Increasingly, mothers are not the only Americans with caregiving responsibilities. Many fathers now shoulder childcare duties, and workers' eldercare responsibilities are growing sharply due to the increase in the population of older Americans and the fact that many Americans

cannot retire due to economic conditions in the U.S.⁴⁵ In 1963, the Report of the PCSW helped to elucidate the obstacles to women's fulfillment of their potential. In the legal realm, the Commission devoted a section of its report to "Women under the Law." It recognized that "Equality of rights under the law for all persons, male or female, is so basic to democracy and its commitment to the ultimate value of the individual that it must be reflected in the fundamental law of the land." At that time the Commission was convinced that the U.S. Constitution embodied equality of rights for men and women (under the 5th and 14th Amendments to the Constitution) and that a constitutional amendment did not need to be sought to establish that principle. Since that time, much legislation addressing sex discrimination has been enacted.

The stereotype that the home is primarily or solely the province of the woman all too often gives rise to workplace bias prohibited under more than a dozen statutes and legal theories. Although a majority of FRD claims have been successful under a wide variety of theories, if and when Congress considers amendments to Title VII, it should expressly prohibit gender discrimination based on parental status and family responsibilities.

In the interim, employers should take steps to prevent family responsibilities discrimination. A good first step is to add language prohibiting FRD to one's existing human resource materials. The Center for WorkLife Law offers a model policy employers can use to signal their intention to prohibit FRD.⁴⁶ Employers also should ensure that their managerial employees know of FRD and have a resource for educating themselves about it. In addition, the need for maternity, disability, or FMLA leave should be anticipated by employers and the legal requirements for allowing such leave, *e.g.*,

notice provisions, manner and means of taking leave, and length of leave, should be outlined in detail. Employers should also conduct periodic self-evaluations to ensure that external and internal leave policies are being adhered to appropriately. Internal grievance procedures may help in preventing litigation at an early stage so that employees who believe they have been discriminated against on the basis of their status as a caregiver can raise the issue internally, hopefully avoiding the need for litigation.

1. Joan C. Williams and Nancy Segal, “The New Glass Ceiling: Mothers and Fathers Sue for Discrimination” (report, San Francisco, California, 2002), 2.

2. Cynthia T. Calvert, “Family Responsibilities Discrimination: Litigation Update 2010” (report, San Francisco, California, 2010), 2; Joan C. Williams and Nancy Segal, “Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job,” *Harvard Women’s Law Journal* 26 (2003): 77-82.

3. Invitation to Action, American Women, p. 4.

4. Executive Order 10980, “Establishing the President’s Commission on the Status of Women,” *Federal Register* 26 (1961): 12059.

5. Williams and Segal, “Beyond the Maternal Wall,” 77-78.

6. Shelley J. Correll, Stephen Benard, and In Paik, “Getting a Job: Is There a Motherhood Penalty?” *American Journal of Sociology* 112, no. 5 (2007): 1316, 1320-1321; Stephen Benard and Shelley J. Correll, “Normative Discrimination and the Motherhood Penalty,” *Gender and Society* 24, no. 5 (2010): 616-646.

7. Benard and Correll, “Normative Discrimination and the Motherhood Penalty,” 639.

8. Joseph A. Vandello et al., “When Equal Isn’t Really Equal: The Masculine Dilemma of Seeking Work Flexibility,” *Journal of Social Issues* 69, no. 2 (2013): 314-315.

9. Correll et al., “Getting a Job”; Amy J.C. Cuddy, Susan T. Fiske, and Peter Glick, “When Professionals Become Mothers, Warmth Doesn’t Cut the Ice,” *Journal of Social Issues* 60, no. 4 (2004).

10. Employers cannot discriminate on the basis of sex plus other factors such as having school age children. *See Phillips v. Martin Marietta Corp.* in Milestones in the History of the U.S. Equal Employment Opportunity Commission, 1971, *available at* www.eeoc.gov/eeoc/history/35th/milestones/1971.html.

11. Cynthia T. Calvert and Joan C. Williams, preface to *WorkLife Law's Guide to Family Responsibilities Discrimination*, (San Francisco: Center for WorkLife Law, 2006).

12. Calvert, "Litigation Update 2010," 10; Equal Employment Opportunity Commission, "Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities" (enforcement guidance by an administrative agency, 2007).

13. Equal Employment Opportunity Commission, "Enforcement Guidance."

14. *Ibid.*

15. Equal Employment Opportunity Commission, "Enforcement Guidance"; **Lust v. Sealy, Inc.**, 383 F.3d 580, 583 (7th Cir. 2004).

16. Calvert and Williams, *WorkLife Law's Guide to Family Responsibilities Discrimination*.

17. Discussed *infra*.

18. Calvert and Williams, *WorkLife Law's Guide to Family Responsibilities Discrimination*, 1-1.

19. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

20. *Ibid.*

21. Calvert and Williams, *WorkLife Law's Guide to Family Responsibilities Discrimination*, 1-3, 1-4.

22. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989).

23. *Moore v. Alabama State Univ.*, 980 F. Supp. 426, 431 (M.D. Ala. 1997).

24. *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004).

25. *Id.*

26. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 n.13 (1973).

27. See, e.g., *Bass v. Chemical Banking Corp.*, No. 94 Civ. 8833 (SHS), 1996 WL 374151, at *6 (S.D.N.Y. July 2, 1996); *Coleman v. B-G Maintenance Management*, 108 F.3d 1199, 1204 (10th Cir. 1997); *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 859-860 (5th Cir. 2002); *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 735 (7th Cir. 1994) (ruling against plaintiff where she failed to identify a similarly situated male comparator); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998) (rejecting plaintiff's claim on the grounds that employees injured on the job are not similarly situated to pregnant employees).

28. See, e.g., *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 468 (2d Cir. 2001); *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 584 (1st Cir. 1999).

29. Equal Employment Opportunity Commission, "Enforcement Guidance." Thus, the plaintiff's comparator may be rejected because the incident involving the comparator did not occur sufficiently close in time to the adverse employment action alleged by the plaintiff.

30. *Ibid.*

31. See, e.g., *Roberts v. United States Postmaster Gen.*, 947 F. Supp. 282, 288-89 (E.D. Tex. 1996) (concluding that employee's claims that the employer's refusal to allow her to use sick leave to care for her child raised a claim of disparate impact).

32. Kingsley R. Browne, "Statistical Proof of Discrimination: Beyond 'Damned Lies'," *Washington Law Review* 68 (1993): 478, 486-487; Marcel C. Garaud, "Legal Standards and Statistical Proof in Title VII Litigation: In Search of a Coherent Disparate Impact Model," *University of Pennsylvania Law Review* 139 (1990): 456-457.

33. *Hazelwood School Dist. v. U.S.*, 433 U.S. 299, 308 (1977).

34. 29 U.S.C. §§ 2601-2653 (2012).

35. See Equal Employment Opportunity Commission Fact Sheet: *The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964* (1995), <http://www.eeoc.gov/policy/docs/fmlaada.html>, at Q&A 12 ("An otherwise qualified individual with a disability is entitled to more than 12 weeks of unpaid leave as a reasonable accommodation if the additional leave would not impose an undue hardship on the operation of the employer's business."); Joan C. Williams, Robin Devaux, Danielle Fuschetti & Carolyn Salmon, *A Sip of Cool Water: Pregnancy Accommodation after the ADA Amendments Act*, 32 *Yale L. & Pol'y Rev.* (forthcoming Jan. 2014).

36. 42 U.S.C. § 12101 *et seq.* (2013).
37. Equal Employment Opportunity Commission, “Interpretive Guidance on Title I of the Americans with Disabilities Act,” 29 C.F.R. § 1630.8 app.
38. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation after the ADA Amendments Act*.
39. *Id.*; see also *Fact Sheet: The Pregnancy Discrimination Act and the Amended Americans with Disabilities Act: Working Together to Protect Pregnant Workers*, NATIONAL WOMEN’S LAW CENTER (August 2013), available at http://www.nwlc.org/sites/default/files/pdfs/pda_adaaa_preg_workers_fact_sheet.pdf.
40. See Williams et al., *A Sip of Cool Water: Pregnancy Accommodation after the ADA Amendments Act*.
41. 29 U.S.C. § 1001 *et seq.* (2013).
42. *Strate v. Midwest Bankcentre, Inc.*, 396 F.3d 1011 (8th Cir. 2004); *Fleming v. Ayers & Associates*, 948 F.2d 993 (6th Cir. 1991).
43. *Grew v. Kmart*, 2006 U.S. Dist. LEXIS 6994 (N.D. Ill. 2006).
45. Calvert, “Litigation Update 2010”; Cynthia T. Calvert, “Family Responsibilities Discrimination: Litigation Update 2014” (report, San Francisco, California, forthcoming 2014).
45. Jean C. Setzfand, “Think You’re Saving Enough to Ever Retire?” AARP, modified March 19, 2013, <http://www.aarp.org/work/retirement-planning/info-03-2013/retire-with-confidence.html>; Liana C. Sayer, Suzanne M. Bianchi, and John P. Robinson, “Are Parents Investing Less in Children? Trends in Mothers and Fathers Time with Children,” *American Journal of Sociology*, 110, no. 1 (2004): 1, 10.
46. “Sample Policies on Family Responsibilities Discrimination for Management Policy Manuals,” Center for WorkLife Law, accessed October 18, 2013, <http://worklifelaw.org/pubs/WorkLifeLaw-SampleFRD-PoliciesForManagemenManual.pdf>.

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